U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 14 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer engineering consulting firm. It seeks to employ the beneficiary permanently in the United States as an applications software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not qualify as a member of the professions holding an advanced degree. Specifically, the director determined that the beneficiary did not possess a baccalaureate degree or five years of post-baccalaureate experience as of the priority date in this matter.

On appeal, counsel requests that the petition be adjudicated under a lesser classification and asserts that the petitioner did have a baccalaureate as of the priority date. Counsel asserts that the request to amend the petition to seek a lesser classification is in "accordance with the Service's policy." Counsel cites no legal authority, and we know of none, that allows a petitioner to seek a lesser classification once the director has already adjudicated the petition based on the classification initially requested. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). The appeal, therefore, will be adjudicated pursuant to section 203(b)(2) of the Act, the classification initially requested.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The priority date, the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor, 8 C.F.R. § 204.5(d), is August 1, 2003. The petitioner must establish the beneficiary's eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971). On the Form ETA 750B, signed by the beneficiary on July 24, 2003 under penalty of perjury, the beneficiary listed a "Bachelor's degree" in Computer Science from Strayer University under "Degrees or Certificates *Received.*" (Emphasis added.) In support of the petition, the petitioner submitted the beneficiary's Bachelor of Science degree from Strayer University issued in March 2004. Thus, as of the priority date, August 1, 2003, the beneficiary had not yet received a degree from Strayer University.

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

On the ETA 750B, the beneficiary also listed a three-year "Associate Degree" in Microcomputer Application from the Shanghai Specialized School of Metallurgy. The petitioner submitted evidence that the beneficiary received this degree in July 1991. Thus, the issues are whether the beneficiary's degree from the Shanghai Specialized School of Metallurgy is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's years of education at Strayer University in addition to the foreign degree. Finally, we must consider whether the beneficiary has the necessary post-baccalaureate experience to qualify as a member of the professions with an advanced degree, the classification requested on the petition.

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien

is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [current section 212(a)(5)].[2] Id. at 423. The necessary result of these two grants of authority is that section 212(a)[(5)] determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)]. If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)[(5)] determinations.

Madany v. Smith, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984).

The petitioner initially submitted an evaluation of the beneficiary's degree from the Shanghai Specialized School of Metallurgy prepared by [redacted] of the Foundation for International Services. [redacted] concluded that this degree was "equivalent to three years of lower division university-level credit (an associate's degree) from an accredited community college in the United States." [redacted] concluded that the beneficiary's education *in combination* with the beneficiary's "employment experiences" afforded the beneficiary "an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States."

On appeal, the petitioner submits a new evaluation from [redacted] of Silvergate Evaluations. [redacted] considers only the beneficiary's degree from the Shanghai Specialized School of Metallurgy in combination with the beneficiary's one and a half years of coursework at Strayer University and concludes that the beneficiary had "satisfied requirements substantially similar to those required toward the completion of academic studies leading to a Bachelor's Degree

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[2] As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

in Computer Science from an accredited institution of higher education in the United States based upon his academic credentials prior to August 2003." In summation, [redacted] concludes that based on the beneficiary's academic credentials prior to August 2003, the beneficiary "has attained the equivalent of a Bachelor's Degree in Computer Science from an accredited institution of higher education in the United States." The petitioner also submitted the beneficiary's transcript from Strayer University. Significantly, Strayer credited the beneficiary with her coursework from the Shanghai Specialized School of Metallurgy and still did not award the beneficiary a baccalaureate until March 22, 2004, after the priority date in this matter.

Also on appeal, counsel asserts that the beneficiary's education was deemed equivalent to a U.S. baccalaureate at the nonimmigrant petition stage. While counsel acknowledges that the regulations relating to nonimmigrant visa petitions are different from the immigrant regulations, he asserts that the same standard should be used "to maintain a consistency in findings required by immigration law."

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazi Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Regl. Commr. 1977). The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990). At the time of enactment of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorilland v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) relating to *nonimmigrants* provides guidance on determining the "equivalence to completion of a college degree," permitting a combination of education and experience. In 1991, however, when the final rule for 8 C.F.R. § 204.5 was published

in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

Employment-Based Immigrants, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of a lesser degree and subsequent coursework, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." For the reasons discussed above, we are not persuaded that the language pertaining only to nonimmigrants at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), allowing for the "equivalence to completion of a college degree," should be applied in the immigrant context. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is a United States baccalaureate degree or a "foreign equivalent degree." 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Moreover, [redacted]s evaluation of the beneficiary's education as equivalent to a U.S. baccalaureate as of August 1, 2003 is not consistent with the record. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an opinion is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *See Matter of Sea, Inc.,* 19 I&N Dec. 817, 820 (Commr., 1988). As

noted above, despite allowing the beneficiary to transfer credits from the Shanghai Specialized School of Metallurgy, Strayer University still did not issue the beneficiary a baccalaureate until 2004.

Even if we were to accept that the beneficiary's associate's degree plus the coursework at Strayer University as of August 1, 2003 constituted a foreign equivalent degree, and we do not, the beneficiary did not, as of the priority date in this matter, have five years of experience after acquiring sufficient education to equal a baccalaureate. Thus, he cannot meet the definition of a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2), which requires five years of post-baccalaureate experience in lieu of an advanced degree.

In light of the above, we uphold the director's finding that the beneficiary does not qualify for classification as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.